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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 804

THE BORDEN COMPANY,

Petitioner,

vs.

L. B. LIDDY, SECRETARY OF AGRICULTURE OF THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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L. B. LIDDY, SECRETARY OF AGRICULTURE OF THE STATE OF IOWA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable, The Chief Justice of the United States and Associated Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Circuit Court of Appeals for the Eighth Circuit entered on the 13th day of November, 1962, dismissing the appeal of The Borden Company from the United States District Court and remanding the case to the District Court with instructions to initiate the procedure for setting up of a three-judge District Court under the provisions of 28 U. S. C. A., Sections 2281, 2284, which

three-judge court to thereafter determine this cause. This Judgment did not determine the case on its merits. A Rehearing was denied by Order of the Circuit Court of Appeals on December 10, 1962, without an opinion.

THE OPINIONS BELOW.

The District Court filed an Opinion denying the injunction demanded by The Borden Company, plaintiff in said action, which Opinion is reported in 200 F. Supp. 221. (Record pp. 22-32.) Judgment of District Court " * * * for the defendant * * *". (Record p. 32.) The Circuit Court of Appeals filed its Opinion and a separate Judgment Entry on November 13, 1962, which Opinion is unreported. The Opinion and Judgment are set forth in Appendix A. pp. i-xii and xiii annexed hereto. A petition for rehearing (Appendix A. p. xiv) was denied by the Circuit Court of Appeals December 10, 1962, by Court Order (Appendix A. p. xvii). The Circuit Court of Appeals, in its Opinion (Appendix A. p. xii) held that the District Court, by reason of the provisions of Sections 2281 and 2284 of 28 U. S. C. A., did not have jurisdiction to determine the issues on their merits, but only to issue a temporary restraining order. The Judgment of the Circuit Court of Appeals dismissed the appeal, and remanded the case to the District Court with instructions to initiate the procedure for setting up a three-judge court under 28 U. S. C. A. 2284, the three-judge court to thereafter determine this cause. (Appendix A. p. xii.)

JURISDICTION.

The jurisdiction of this Court to review the aforesaid Judgment of the Circuit Court of Appeals is invoked under the provisions of 28 U. S. C. A. 1254(1), as supplemented by Rule 19(b) of the Rules of the Supreme Court.

QUESTION PRESENTED.

Did the United States District Court, sitting as a one-judge court, have jurisdiction to determine the issues in this action, or was it necessary to convene a statutory three-judge court?

STATUTES INVOLVED.

The pertinent provisions of the Laws of the United States and the State of Iowa, are as follows:

U. S. C. A., Title 28, Section 1254(1).
U. S. C. A., Title 28, Section 2201.
U. S. C. A., Title 28, Section 2281.
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U. S. C. A., Title 21, Section 341.
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Section 189.11, Code of Iowa 1958 (Appendix B p. xix).
Section 189.15, Code of Iowa 1958 (Appendix B p. xix).
Section 189.19, Code of Iowa 1958 (Appendix B p. xix).
Section 190.1(34), Code of Iowa 1958 (Appendix B p. xx).
Chapter 109, Laws of the 56th General Assembly of Iowa (Appendix B p. xviii).

STATEMENT OF THE CASE AND REASONS FOR ALLOWANCE OF THE WRIT.

The basis of Federal jurisdiction alleged by The Borden Company in its Complaint filed in the District Court was the Declaratory Judgment Act (28 U. S. C. A. 2201). The Complaint in part alleged:

"(3) This is a civil action of which the United States District Court for the Southern District of Iowa, Central Division, has original jurisdiction, and is a suit for a Declaratory Judgment pursuant to the Federal Declaratory Judgment Act in a case of actual controversy between the plaintiff and the defendant, as more fully hereinafter appears. * * *" (Record, p. 1.)

It is the position of The Borden Company, Petitioner, that neither its Complaint nor the pleadings alleged the unconstitutionality of a state statute and that no application for an injunction was made by The Borden Company to restrain a state officer from enforcing or executing a state statute upon the ground of the unconstitutionality of such statute. (Record pp. 1-6.)

The dispute between the parties to this action arises by reason of the insistence of the Iowa Secretary of Agriculture that ice cream (which conforms to the federal standard but which contains less milk fat than is required by the Iowa standard) shipped into Iowa from other States and also ice cream (which conforms to the federal standard but which contains less milkfat than is required by the Iowa standard) that is manufactured in Iowa for shipment to other states must conform to the Iowa statutory standard for ice cream which requires that ice cream must contain "* * * not less than 12 percent by weight of milkfat and not less than 20 percent by weight of total milk solids * * *" (Appendix B p. xx), whereas the formula followed by The Borden Company complied with the standard provided in the Federal definition and standard of identity for ice cream, which requires that ice cream must contain "not less than 10 percent and 20 percent, respectively," of milkfat and total milk solids in the weight of finished ice cream. (Appendix C p. xxii.) Hence, the basic issue in this action on the merits involves the differing and conflicting requirements between the Federal standard and the

Iowa standard concerning the amount of milkfat that must be contained in a product that is labeled and sold as ice cream when such product is in interstate commerce.

The contention of The Borden Company in the United States District Court and throughout this action is that the United States Government has pre-empted the field of regulating the standards for ice cream in interstate commerce by the adoption of the Federal Food and Drug Administration, Department of Health, Education and Welfare, of Title 21, Chapter 1, subchapter B, Part 20, "Frozen Desserts, Definitions and Standards of Identity" which became effective July 27, 1960 (Federal Register Part II, Volume 25, No. 145, pages 7126 to 7141). Section 20.1 of said regulations, as noted above, requires that the content of milkfat and total milk solids must be not less than 10 percent and 20 percent, respectively, of the weight of finished ice cream. (Appendix C p. xxii.) The Borden Company therefore contends that the United States Government thereby pre-empted, assumed and exercised its full and complete jurisdiction and control over the manufacture, distribution, labeling and sale in interstate commerce of frozen desserts as defined in the Act, including ice cream. The Borden Company further contends that under Section 190.1(34) and Section 189.11, paragraph 2, Code of Iowa 1958, providing for the content of milkfat and total milk solids, the State of Iowa assumed and exercised its full and complete jurisdiction and control over the manufacture, distribution, labeling and sales of frozen desserts, including ice cream, in Iowa, but not ice cream and frozen desserts in interstate commerce. The Iowa Statute (189.19, Code of Iowa 1958) provides that any person found in violation of the Iowa Act or the rules and regulations made by the Iowa Department of Agriculture thereunder may be subjected to fine, arrest and imprisonment in the county jail, and also to an injunction restraining the opera-

tion of such business. (Appendix B, p. xix.) It was alleged and argued by The Borden Company in the courts below that the Defendant Secretary of Agriculture unlawfully demanded that The Borden Company comply with the provisions of the Iowa Statutes (Section 190.1(34), Iowa Code 1958) as to the contents of its ice cream made for sale in interstate commerce and shipped into and out of the State of Iowa by The Borden Company, and threatened to enforce the penalty provided by the Iowa Statutes against The Borden Company by fine, arrest, prosecution and injunction in the event the plaintiff delivered and sold ice cream shipped and received in interstate commerce that complied with the Federal regulations and standards (Federal Register, Volume 25, No. 145, Part 20.1(a)), but did not comply with the provisions of the Iowa Statutes as to the milkfat content of ice cream, and this he would do even though the said ice cream conformed in all respects to the Federal regulations. It was further alleged in the Complaint filed by The Borden Company in the United States District Court:

> "That *to enforce* the aforesaid penalties of the Iowa law against this plaintiff by reason of its compliance with the Federal Statutes and regulations, is a wrongful interference with the exclusive power of Congress over interstate commerce, illegal, arbitrary, discriminatory and in conflict with the statutes and Constitution of the United States and the aforesaid rules and regulations promulgated thereunder and deny to the plaintiff the due process and equal protection of the law, in violation of Article I, Section 8, Amendments V and XIV of the Constitution of the United States." (Emphasis supplied.) (Record p. 4.)

The Borden Complaint also alleged:

> "That there is a dispute between the plaintiff and defendant as to whether or not the provisions of the Iowa Code above cited and the rules and regulations thereunder apply to the interstate business of the

plaintiff company, including the shipment and sale of ice cream in the state of Iowa which has been manufactured outside the State of Iowa, and ice cream manufactured in the State of Iowa for shipment and sale to points outside the State of Iowa.

"That the defendant has unlawfully demanded the plaintiff comply with the aforesaid provisions of the Statutes of Iowa." (Record p. 4.)

It was further alleged by The Borden Company in its Complaint and contended throughout the case:

"That the United States Government has, by reason of the matters hereinbefore alleged, pre-empted, assumed and exercised its full and complete jurisdiction and control over the manufacture, distribution, labeling and sale in interstate commerce of frozen desserts, including ice cream." (Record p. 3.)

Paragraphs 9, 10, 11 and 12 of the Complaint (Record p. 4) refer to the dispute between the parties as involving the question of whether or not the threatened acts of Liddy, the Secretary of Agriculture of the State of Iowa, if carried out, would be contrary to the provisions of both the Federal and State Statutes and unduly burden interstate commerce.

The Complaint is directed against the threatened acts of the Defendant Liddy and does not attack the constitutionality of the state statutes, but to the contrary, invoked Section 189.11, Code of Iowa 1958. This position was also stated by The Borden Company in the Circuit Court of Appeals.

It has been held in similar situations that a three-judge court is not required where, as in this case, the state statute has been superseded and rendered inoperative as to interstate commerce by the Federal Government which pre-empted the field. The Iowa Legislature recognized the Federal right to pre-empt in this situation by the adoption

of Chapter 109, Laws of the 56th General Assembly (Appendix B, p. xviii) which became the second paragraph of Section 189.11, Code of Iowa 1958. (*Board of Trade of Chicago* v. *Illinois Commerce Commission*, 156 F. 2d 33, reversed on other grounds, 331 U. S. 247, 255, 256, 91 L. ed. 1468, 1474, 62 S. Ct. 1160).

The statement in the Opinion of the District Court that Section 189.15, Code of Iowa, was not so burdensome upon interstate commerce as to be violative of the Commerce Clause of the Federal Constitution was not in response to any pleading or prayer of The Borden Company and was only a voluntary observation or statement of the District Court. (Record p. 31.)

In not requesting a three-judge court The Borden Company was guided by the principle that has been announced by this Court that "Until the complainant in the district court attacks the constitutionality of a statute, the case does not require the convening of a three-judge court."

Kessler v. *Department of Public Safety, Financial Responsibility Division, State of Utah*, ... U. S. ....., 7 L. ed. 2d 641, 645, 82 S. Ct. .....

ex parte Bransford, 310 U. S. 354, 84 L. ed. 1249, 60 S. Ct. 947.

ex parte Hobbs, 280 U. S. 168, 74 L. ed. 353, 50 S. Ct. 83.

Phillips v. *United States*, 312 U. S. 246, 85 L. ed. 800, 805, 806, ... S. Ct. .....

In Phillips v. *United States*, *supra*, at page 805 of the Law Edition, there is the following statement from this Honorable Court's Opinion:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy,

whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission'. The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases. * * *.

"But an attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority even though a misreading of the statute is invoked as justification. At least not within the congressional scheme of Section 266. *It is significant that the United States in its complaint did not charge the enabling acts of Oklahoma with unconstitutionality, but assailed merely the Governor's action as exceeding the bounds of law. In other words, it seeks a restraint not of a statute but of an executive action.*" (Emphasis supplied.)

This is precisely what the Petitioner, The Borden Company, has done in the case at bar, that is to assail the action of the Secretary of Agriculture.

Also, in the above-cited case, at page 806 of the Law Edition there is the following statement:

"On its face, Section 266 precludes a reading which would bring within its scope every to restrain the conduct of a state official whenever, in the ultimate reaches of litigation, some enactment may be said to authorize the questioned conduct."

In *ex parte Bransford*, 84 L. ed. 1249, 310 U. S. 354, at page 1253 of the Law Edition this Court said:

"Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction."

In the case at bar an examination of the Complaint will disclose that there is no attack whatsoever upon the constitutionality of the State Statute.

In *ex parte Hobbs*, 74 L. ed. 353, 280 U. S. 168, another Opinion of this Honorable Court concerning the use of a three-judge court, the Opinion, at page 354 of the Law Edition, states:

> "The bills also allege that the statutes of Kansas as construed to authorize the order are unconstitutional like it and for the same reason. The bills pray for a restraining order *ad interim*, an interlocutory injunction after a hearing before three judges, and a permanent injunction by final decree."

At page 355 of the Law Edition, the Opinion reads:

> "But if the injunction is taken as we say that it should be, it is not within Judicial Code, Section 266; three judges were not necessary, and the petitioners have no right to come here." (Citing numerous decisions.)

The Petitioner respectfully states to the Court that it believes the Opinions of this Honorable Court in the cited cases clearly sustain the procedure followed by the Petitioner. The constitutionality of the Iowa Statute was not in any way challenged in the Complaint or in any manner by this action, which is confined to an effort to restrain the threatened arbitrary and illegal action of the Secretary of Agriculture of the State of Iowa.

The position of The Borden Company would be clearly sustained in this litigation by the proper construction and application of the pertinent Federal Statutes and Iowa Statutes involved, particularly Section 189.11, Code of Iowa 1958, which provides in part that:

> "Notwithstanding any other requirements of this Chapter, food and food products labeled in conformance with the labeling requirements of the Government of the United States of America shall be deemed to be labeled in conformance with the laws of the State of Iowa." (Appendix B, p. xix.)

The Complaint in this action, under the authorities cited herein, in the Petitioner's opinion, did not challenge the constitutionality of the Iowa Statute. It is only the illegal and arbitrary action of the State Secretary of Agriculture that is challenged and which would deprive the Petitioner of its property illegally and without due process of law.

PRAYER FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

For the reasons set forth in this Petition, Petitioner prays the grant of this Court's Writ of Certiorari to review and reverse the judgment of the Circuit Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

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APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,961.

The Borden Company, *Appellant*,
vs.
L. B. Liddy, Secretary of Agriculture of the State of Iowa, *Appellee*.

Appeal from the United States District Court for the Southern District of Iowa.

[November 13, 1962.]

Before VOGEL and VAN OOSTERHOUT, *Circuit Judges*, and VAN PELT, *District Judge*.

VOGEL, *Circuit Judge*.

The Borden Company, plaintiff-appellant, brought this action against L. B. Liddy, Secretary of Agriculture of the State of Iowa, defendant-appellee, seeking a declaratory judgment. It also asked for a temporary restraining order and preliminary and final injunctions. The controversy arises out of a difference between state and federal laws establishing the milkfat content of ice cream.

Borden is engaged in the manufacturing, processing, sale at wholesale and distribution of ice cream in bulk in interstate commerce through and into various states, in-

cluding Iowa. Liddy, as Secretary of Agriculture of the State of Iowa, is charged with the duty of administering and enforcing those provisions of the law of Iowa hereinafter referred to.

Prior to July 1, 1961, there was no federal regulation establishing definitions and standards of identity for ice cream and other frozen desserts. The various states and the District of Columbia by legislation or regulation fixed minimum standards for milkfat content in ice cream. Four states and the District of Columbia required a minimum of 8%. Twenty-five states required a minimum of 10%. Fifteen states, including Iowa, required a minimum of 12%. One state required a minimum of 13%, and three states a minimum of 14%. 25 Fed. Reg. 7132 F. F. #44.

On July 4, 1961, following extensive hearings, there went into effect a regulation issued by the Commissioner of Foods and Drugs under authority delegated to him by the Secretary of Health, Education and Welfare in accordance with the Federal Food, Drug and Cosmetic Act, 21 U. S. C. A. §§ 341, 371 (3), which regulation provided for a minimum milkfat content in ice cream of 10%[1] as opposed to Iowa's requirement of 12%.[2]

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1. Section 20.1 of the Regulations (21 C. F. R.), among other things, provides as follows:

"(a) Ice cream is the food prepared by freezing, while stirring, a pasteurized mix composed of one or more of the optional dairy ingredients specified in paragraph (c) of this section, sweetened with one or more of the optional sweetening ingredients specified in paragraph (d) of this section. * * * The kind and quantity of optional dairy ingredients used, as specified in paragraph (c) of this section, and the content of milk fat and nonfat milk solids therein, are such that the weights of milk fat and total milk solids are not less than 10 percent and 20 percent, respectively, of the weight of the finished ice cream; * * *."

2. The Code of Iowa 1958 provides:

"*189.14 Mislabeled articles*

No person shall knowingly introduce into this state, solicit orders for, deliver, transport, or have in his possession with

It was stipulated by the parties:

"The defendant, L. B. Liddy, as Secretary of Agriculture, in his official capacity, has made demand upon this plaintiff that it comply with the aforesaid provisions of the Statutes of Iowa, specifically Section 190.1 (34), Code of Iowa, 1958, and threatens to enforce the provisions of Section 189.19, Code of Iowa 1958, against this plaintiff, its officers and employees unless the plaintiff immediately complies with Section 190.1 (34) of the Iowa Statutes aforesaid in regard to ice cream manufactured by The Borden Company outside of the State of Iowa for sale in Iowa and ice cream manufactured by The Borden Company in Iowa for delivery and sale in adjoining states in interstate commerce."

Borden's complaint alleged that:

"* * * to enforce the aforesaid penalties of the Iowa Law against this Plaintiff by reason of its con-

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intent to sell, any article which is labeled in any other manner than that prescribed by this title for the label of said article when offered or exposed for sale, or sold in package or wrapped form in this state."

"*189.15 Adulterated articles*

No person shall knowingly manufacture, introduce into the state, solicit orders for, sell, deliver, transport, have in his possession with the intent to sell, or offer or expose for sale, any article which is adulterated according to the provisions of this title."

"*189.19 Penalty*

Unless otherwise provided, any person violating any provision of this title, or any rule made by the department and promulgated under the authority of said department, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days, and on a third conviction for the same offense may be restrained by injunction from operating such place of business."

§ 190.1, Code of Iowa 1958, provides in part as follows:

"*34. Ice cream.* Ice cream is a pure clean frozen product made from ice cream mix and a harmless flavoring. It shall contain not less than twelve percent by weight of milk fat and not less than twenty percent by weight of total milk solids, except * * *."

pliance with the Federal Statutes and regulations, *is a wrongful interference with the exclusive power of Congress over interstate commerce*, illegal, arbitrary, *discriminatory and in conflict with the statutes and Constitution of the United States* and the aforesaid rules and regulations promulgated thereunder and deny to the Plaintiff the due process and equal protection of the law, *in violation of Article I, Section 8 and Amendments V and XIV of the Constitution of the United States.*" (Emphasis supplied.)

Borden asked the United States District Court for the Southern District of Iowa for a temporary restraining order and a preliminary and permanent injunction "* * * restraining and enjoining them [Liddy and all officials, agents, servants and employees] from enforcing the provisions of Section 190.1 (34) Code of Iowa 1958 and the rules and regulations of the Secretary of Agriculture of the State of Iowa * * *." On July 7, 1961, the District Court granted Borden's request for a temporary restraining order. Subsequently the matter was tried by the District Judge upon an agreed stipulation of facts. On December 16, 1961, the District Judge denied the ultimate relief asked for by Borden because:

> "The Iowa statute in question does not discriminate against interstate commerce as such. The court is of the opinion that after considering all the facts and circumstances the provisions of Iowa Code, Sec. 189.15 are not so burdensome upon interstate commerce as to be violative of the commerce clause of the federal Constitution."

See *Borden Company* v. *Liddy*, D. C. S. D. Ia., 1961, 200 F. Supp. 221.

A three-judge court was not asked for by the parties nor convened by the District Judge in order to pass on the application for the preliminary and permanent injunctions. In failing to call a three-judge court and in

passing upon the request for a preliminary and permanent injunction, we believe the District Judge overlooked the provisions of 28 U. S. C. A. § 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

Borden's complaint alleges that the United States, by reason of its passing the regulations supra, has "pre-empted, assumed and exercised its full and complete jurisdiction and control over the manufacture, distribution, labeling and sales in interstate commerce of frozen desserts, including ice cream" and that Liddy's threat to enforce the law of Iowa supra and invoke the penalties provided therefor against Borden is a challenge to both the Supremacy Clause of the Constitution and the Commerce Clause as well.

It is true that some cases have exempted from the operation of § 2281 attacks upon a statute based solely upon federal pre-emption. The reasoning of such cases is that only an unconstitutional result is alleged and not unconstitutionality per se, and that pre-emption involves only the interpretation of a federal statute. See *Penagaricano* v. *Allen Corporation*, 1 Cir., 1959, 267 F. 2d 550; *Board of Trade of City of Chicago* v. *Illinois Commerce Commission*, 7 Cir., 1946, 156 F. 2d 33, reversed in part on other grounds (1947), 331 U. S. 247, 67 S. Ct. 1160, 91 L. Ed. 1468; *Cloverleaf Butter Co.* v. *Patterson*, 5 Cir., 1941, 116 F. 2d 227, reversed on other grounds, 315 U. S. 148, 62

S. Ct. 491, 86 L. Ed. 754; *Pennsylvania Greyhound Lines* v. *Board of P. U. Com'rs.*, D. N. J., 1952, 107 F. Supp. 521, 525; *Farmers Gin Co.* v. *Hayes*, W. D. Okla., 1943, 54 F. Supp. 43. The rationale of these cases would seem to be seriously questioned by Justice Frankfurter in *Kesler* v. *Department of Public Safety of Utah*, 1962, 369 U. S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641, where he states, at page 156 of 369 U. S.:

> "* * * This was so heard [by a three-judge court] and appeal was properly brought directly here, unless invalidation of a state statute by virtue of the Supremacy Clause rests on a different constitutional basis than such invalidation because of conflict with any other clause of the Constitution, at least to the extent of reading such an implied exception into the procedure devised by § 2281. *Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281.*" (Emphasis supplied.)

It is unnecessary to determine, however, whether *Kesler* is now authority for the proposition that where only the Supremacy Clause is involved because of claimed pre-emption, a three-judge court must nevertheless be constituted. Here, in addition to the allegation of pre-emption, Borden has invoked Article I, Section 8, Amendment V and Amendment XIV in contravention of the Iowa statutes.

Campbell v. *Hussey*, 1961, 368 U. S. 297, 82 S. Ct. 807, 7 L. Ed. 2d 299, involved a suit brought by the owners and operators of tobacco warehouses in Georgia to enjoin the Commissioner of Agriculture of the State of Georgia and other state officials from enforcing certain provisions of the Georgia Tobacco Identification Act. Federal regulations required that flue cured tobacco be identified by a blue tag stating the type and grade thereof. Georgia law

required Type 14 flue cured tobacco to be identified by a white tag. A three-judge court was convened and in 189 F. Supp. 54 held that the Georgia law burdened interstate commerce and, additionally, that the federal regulation had preempted the field. In affirming, the Supreme Court, in a footnote at page 298 of 368 U. S., had this to say with reference to the jurisdictional question of a three-judge court:

> "Of the several infirmities which Georgia's law is alleged to have, only one was reached by the lower court, namely, the constitutionality of the law in light of the requirements of the Commerce Clause. The complaint also challenged the constitutionality of the law on the grounds that it violated both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment. Plainly the case was one to be heard by a three-judge court. See *Florida Lime Growers* v. *Jacobsen*, 362 U. S. 73."

Query v. *United States*, 1941, 316 U. S. 486, 62 S. Ct. 1122, 8 L. Ed. 1616, involved a suit to restrain enforcement of a state tax on the purchase and sale of goods at Army post exchanges, upon the grounds that such exchanges are federal instrumentalities and that therefore the state statute imposing the tax was, *as applied to them*, unconstitutional. The Supreme Court stated therein, at page 490 of 316 U. S.:

> "Here a substantial charge has been made that a state statute, as applied to the complainants, violates the Constitution. Under such circumstances, we have held that relief in the form of an injunction can be afforded only by a three-judge court pursuant to § 266. *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10; *Ex parte Bransford*, 310 U. S. 354, 361. And this is not, like *Phillips* v. *United States*, 312 U. S. 246, a case in which the state officials threatened to engage in conduct which state law could not reasonably be construed to authorize. The complainants in this

> case sought interlocutory and permanent injunctions against 'the enforcement, operation, or execution of a 'statute of a State'; they sought to restrain the action of officers 'of such State in the enforcement or execution of such statute'; and their attack was based entirely 'upon the ground of the unconstitutionality of such statute.' "

Florida Lime Growers v. *Jacobsen*, 1960, 362 U. S. 73, 80 S. Ct. 568, 4 L. Ed. 2d 568,[3] involved a conflict between § 792 of the California Agricultural Code prohibiting the importation and sale in California of avocados containing less than 8% of oil by weight as opposed to Florida Avocado Order No. 69 issued by the United States Department of Agriculture. The Supreme Court held there, at pages 84 and 85 of 362 U. S.:

> "To hold that only one judge may hear and decide an action to enjoin the enforcement of a state statute on both constitutional and nonconstitutional grounds would be to ignore the explicit language and manifest purpose of § 2281, which is to provide for a three-judge court whenever an injunction sought against a state statute may be granted on federal constitutional grounds. Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged, we think the case is one that is '*required* by . . . Act of Congress to be heard and determined by a district court of *three* judges.' 28 U. S. C. § 1253. (Emphasis added.)"

If the determinations of the conflict between state and federal regulations on avocados, as in *Florida Lime Growers*, and the conflict between state and federal regulations on tobacco identification, as in *Hussey*, required the convening of three-judge courts for the granting or denial of

3. Note subsequent trial of this case before a three-judge court in *Florida Lime Growers* v. *Paul*, 197 F. Supp. 780, and the Supreme Court's noting "probable jurisdiction" of an appeal in 368 U. S. 964, January 15, 1962.

interlocutory and permanent injunctions, then it would appear to us inescapable that this case, claiming as it does threatened action in violation of the Commerce Clause and the Supremacy Clause, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and in which interlocutory and permanent injunctions were asked, required the same treatment.

While no three-judge court was requested herein, it was nevertheless the duty of the District Judge, upon receiving an application for a restraining order and preliminary and final injunctions seeking to restrain enforcement and operation of the Iowa statute upon the ground of the unconstitutionality of such statute as it was attempted to be invoked, to himself initiate the necessary proceeding for the setting up of a three-judge district court in accordance with 28 U. S. C. A. § 2284. See *Aaron* v. *Cooper*, 8 Cir., 1959, 261 F. 2d 97, 105, wherein this court stated:

> "• • • There is no requirement in § 2284 that the applicant for the injunction must determine the need for a three-judge court and make request therefor, and no provision that, if this is not done, there is a lack of judicial jurisdiction. The practical, expediting and procedural nature of the statute suggests to the contrary that the legislative intention was that the district judge to whom an application for an injunction is presented must exercise the responsibility not only of determining whether it is in fact a three-judge case or a single-judge matter but also of taking the necessary action on this basis for enabling the case to be disposed of on its merits."

And as stated by Mr. Chief Justice Hughes in *Stratton* v. *St. Louis S. W. Ry. Co.*, 1930, 282 U. S. 10, 51 S. Ct. 8, 75 L. Ed. 135, at page 15 of 282 U. S.:

> "If an application for an interlocutory injunction is made and pressed to restrain the enforcement of a state statute, or of an administrative order made

pursuant to a state statute, upon the ground that such enforcement would be in violation of the Federal Constitution, a single judge has no jurisdiction to entertain a motion to dismiss the bill on the merits. *He is as much without power to dismiss the bill on the merits, as he would be to grant either an interlocutory or a permanent injunction.* His authority is strictly limited to granting, upon proper cause being shown, a temporary restraining order to be effective only pending the determination of the application for an interlocutory injunction. Upon making such an order, it is his duty immediately to call two other judges, as the statute directs, to assist him in hearing and determining that application. *Ex parte Northern Pacific Railway Company*, 280 U. S. 142, 144." (Emphasis supplied.)

Even where the parties stipulated to a single-judge court, it was stated in *Riss & Co.* v. *Hoch*, 10 Cir., 1938, 99 F. 2d 553, 555:

> "The requirement of a three-judge court is not a mere privilege or right which the parties may waive. It is a jurisdictional requirement."

See also *Idlewild Liquor Corp.* v. *Epstein*, 1962, 370 U. S. 713; *Kesler* v. *Department of Public Safety of Utah*, 1962, 369 U. S. 153, 157; *Ex parte Metropolitan Water Company of West Virginia*, 1911, 220 U. S. 539, 545-546, 31 S. Ct. 600, 53 L. Ed. 575; *Priceman* v. *Dewey*, E. D. N. Y., 1949, 81 F. Supp. 557, 558.

Idlewild Liquor Corp. v. *Epstein*, supra, involved the question of whether the sale of liquor for export and delivery to international airline passengers at their overseas destinations was illegal under a New York statute. The petitioner asked for a judgment declaring that the statute, as applied, was repugnant to the Commerce Clause, the Export-Import Clause and the Supremacy Clause of the Constitution and for an injunction against its enforce-

ment. A request for a 'three-judge court' under 28 U. S. C. A. §§ 2281, 2284 was denied by the District Judge. The Court of Appeals expressed the opinion that a three-judge court should have been convened but that it was powerless to direct such action. The Supreme Court stated, at page 715:

> "We agree with the Court of Appeals that a three-judge court should have been convened in this case. When an application for a statutory three-judge court is addressed to a district court, *the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute.* Those criteria were assuredly met here, and the applicable jurisdictional statute therefore made it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." (Emphasis supplied.)

Since the District Judge here did not consider the necessity for convening a three-judge court, he made no express finding of whether the constitutional issues presented were frivolous. Nevertheless, it fairly appears from his opinion in 200 F. Supp. 221 that he regarded the issues as substantial. We likewise so regard them.

On the question of what a Court of Appeals should do when presented with a situation such as we find here, the Supreme Court said in the *Idlewild Liquor Corp.* v. *Epstein* case, *supra*, at pages 715-716:

> "In the *Stratton* case it was held that a court of appeals was precluded from reviewing on the merits a case which should have originally been determined by a court of three judges. *Stratton* does not stand for the broad proposition that a court of appeals is powerless ever to give any guidance when a single

judge has erroneously invaded the province of a three-judge court. The Court of Appeals clearly stated its opinion that a court of three judges ought to have been convened to consider this litigation. That view was correct and should have been followed upon the petitioner's renewed motion that such a statutory court be impaneled."

We conclude here that the District Judge had jurisdiction only to enter, upon proper cause being shown, the temporary restraining order referred to and that he was without jurisdiction to entertain and determine Borden's request for a preliminary and permanent injunction. The actions of the District Judge in so doing are set aside. This appeal is dismissed and the case is remanded to the District Court with instructions to initiate the procedure for the setting up of a three-judge district court under the provisions of 28 U. S. C. A. § 2284, which three-judge court will thereafter determine this cause.

(JUDGMENT.)

UNITED STATES COURT OF APPEALS

For the Eighth Circuit.

No. 16,961. September Term, 1962.

The Borden Company, *Appellant*, vs. L. B. Liddy, Secretary of Agriculture of the State of Iowa, *Appellee*.	Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the appeal from the United States District Court for the Southern District of Iowa in this cause be, and the same is hereby, dismissed.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with instructions to initiate the procedure for the setting up of a three-judge District Court under the provisions of 28 U. S. C. A. § 2284, which three-judge Court will thereafter determine this cause.

November 13, 1962.

APPELLANT'S PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit.

No. 16,961, Civil.

The Borden Company,

Appellant,

vs.

L. B. Liddy, Secretary of Agriculture of the State of Iowa,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA.

Appellant presents this, its Petition for Rehearing of the above-entitled cause, and in support thereof respectfully shows:

I.

On November 13, 1962, this Court handed down a decision in this cause instructing the District Court to institute proceedings for setting up a three-judge District Court under the provisions of 28 U. S. C. A., Section 2284. The parties to this action have not been heard by this Court on the necessity of convening a three-judge Court. It is the position of The Borden Company, Appellant herein, that this cause is not one requiring the convening of a three-judge Court, but can be decided by this Court on the appeal taken heretofore and submitted on oral arguments.

II.

Neither the Complaint nor the pleadings allege the unconstitutionality of a state statute. Paragraphs 9, 10 and 11 of the Complaint (R. 4) refer to the dispute between the parties as involving the question of whether or not the state statutes apply to interstate business. Borden alleges the state statutes do not apply to interstate business and claims that the acts threatened by Liddy, if carried out, would be an undue burden on interstate commerce. The Complaint is directed against the threatened acts of the Defendant and does not attack the state statutes as being unconstitutional.

III.

The Borden Company has never claimed the Iowa statutes were unconstitutional. This position was first stated in this Court on page 2 of Borden's Brief as follows:

> "No claim was made that the Iowa Statutes which set forth definitions and standards of identity for ice cream were unconstitutional, but rather the construction placed on the Statutes by Liddy made an unconstitutional result. It was claimed by Borden that the Iowa Statutes applied only to ice cream manufactured and sold in Iowa on an intrastate basis."

In Brief Point III, starting on page 48 of Borden's Brief filed herein, in referring to the alleged error of the District Court in holding that Section 189.15 was not so burdensome as to violate the commerce clause of the Federal Constitution, Borden called this Court's attention to its position as follows:

> "It should be pointed out again that Borden does not contend that Section 189.15 of the Iowa Code is unconstitutional, but rather it is the contention of Borden that the threatened action of Liddy accomplishes an unconstitutional result by unreasonably burdening interstate commerce."

IV.

The holding of the District Court that Section 189.15 of the Iowa Code was not so burdensome upon interstate commerce as to be violative of the Commerce Clause of the Federal Constitution was not in response to any pleading or prayer of The Borden Company and should not be determinative in considering the necessity of a three-judge Court.

V.

In not requesting a three-judge Court, The Borden Company was guided by the following law as supported by the following authorities:

> "Until the Complaint in the District Court attacks the constitutionality of a statute the case does not require the convening of a three-judge court."
>
> *Ex Parte Bransford*, 310 U. S. 354, 84 L. ed. 1249, 60 S. Ct. 947.
>
> *Ex Parte Hobbs*, 280 U. S. 168, 74 L. ed. 353, 50 S. Ct. 83, and
>
> *Nelson* v. *Jessup*, 134 F. Supp. 218.

Wherefore, it is respectfully submitted that the previous Order of this Court directing the District Court to initiate the procedure for setting up a three-judge Court be set aside and this Court determine this cause on its merits as previously submitted.

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Attorneys for The Borden Company, Appellant.

Of Counsel:
JOSEPH A. GREAVES,
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Chicago, Illinois.

CERTIFICATE.

I, Samuel G. O'Brien, hereby certify that this Petition for Rehearing is submitted in good faith and I believe it to be meritorious.

SAMUEL G. O'BRIEN.

ORDER OVERRULING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS

For the Eighth Circuit.

No. 16961 — September Term, 1962.

The Borden Company, *Appellant*, vs. L. B. Liddy, Secretary of Agriculture of the State of Iowa.	Appeal from the United States District Court for the Southern District of Iowa.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

December 10, 1962.

APPENDIX B.

LAWS OF THE FIFTY-SIXTH GENERAL ASSEMBLY.

CHAPTER 109.

LABELING FOOD PRODUCTS.

S. F. 279.

An Act to amend chapter one hundred eighty-nine (189), Code 1954, relating to inspection and labeling of foods and food products and to provide for acceptance and adoption of standards and practices in the labeling of such food products as have been or may be hereafter established by the government of the United States of America.

Be It Enacted by the General Assembly of the State of Iowa:

Section 1. Amend chapter one hundred eighty-nine (189), Code 1954, by inserting at the end of section one hundred eighty-nine point eleven (189.11) the following:

"Notwithstanding any other requirements of this chapter, foods and food products labeled in conformance with the labeling requirements of the government of the United States of America shall be deemed to be labeled in conformance with the laws of the state of Iowa."

Approved April 27, 1955.

SECTION 189.11, CODE OF IOWA 1958.

189.11 *Labeling of mixtures—federal requirements.* In addition to the requirements of section 189.9, unless otherwise provided, articles which are mixtures, compounds, combinations, blends, or imitations shall be marked as such and immediately followed, without any intervening matter and in the same size and style of type, by the names of all the ingredients contained therein, beginning with the one present in the largest proportion.

Notwithstanding any other requirements of this chapter, foods and food products labeled in conformance with the labeling requirements of the government of the United States shall be deemed to be labeled in conformance with the laws of the state of Iowa. [S13, §§ 2510-d, -r, -v2, 5077-a7; S15, § 4999-a31e; C24, 27, 31, 35, 39, § 3039; C46, 50, 54, § 189.11; 56GA, ch. 109, § 1.]

SECTION 189.15, CODE OF IOWA 1958.

189.15 *Adulterated articles.* No person shall knowingly manufacture, introduce into the state, solicit orders for, sell, deliver, transport, have in his possession with the intent to sell, or offer or expose for sale, any article which is adulterated according to the provisions of this title.

SECTION 189.19, CODE OF IOWA 1958.

Penalty.

Unless otherwise provided, any person violating any provision of this title, or any rule made by the department and promulgated under the authority of said department, shall be punished by a fine of not less than ten dollars nor more than one hundred dollars or by imprisonment in the county jail not to exceed thirty days, and on a third conviction for the same offense may be restrained by injunction from operating such place of business.

SECTION 190.1 (34), CODE OF IOWA 1958 —IOWA ICE CREAM STANDARD.

34. *Ice cream.* Ice cream is a pure clean frozen product made from ice cream mix and a harmless flavoring. *It shall contain not less than twelve percent by weight of milk fat and not less than twenty percent by weight of total milk solids,* except where fruit, fruit juice, or both fruit and fruit juice, nuts, cocoa or chocolate, or cocoa and chocolate syrup, maple syrup, cakes or confections are used for the purpose of flavoring; then it shall contain not less than ten percent by weight of milk fat and not less than sixteen percent by weight of total milk solids.

In no case shall any ice cream contain less than one and six-tenths pounds of total food solids per gallon nor shall the bacteria count exceed one hundred thousand to the cubic centimeter.

A quart of ice cream in factory filled packages shall weigh not less than eighteen ounces. (Italics supplied.)

APPENDIX C.

FEDERAL ICE CREAM STANDARD.

FEDERAL REGISTER, VOLUME 25, NO. 145, PART II.

PART 20—FROZEN DESSERTS; DEFINITIONS AND STANDARDS OF IDENTITY.

Sec. 20.1—Ice cream; identity, label statement of optional ingredients.

Sec. 20.2—Frozen custard, french ice cream, french custard ice cream; identity; label statement of optional ingredients.

Sec. 20.3—Ice milk; identity; label statement of optional ingredients.

Sec. 20.4—Fruit sherbets; identity; label statement of optional ingredients.

Sec. 20.5—Water ices; identity; label statement of optional ingredients.

Authority: §§ 20.1 to 20.5 issued under sec. 701, 52 Stat. 1055; 21 U. S. C. 371. Interpret or apply sec. 401, 52 Stat. 1046, as amended; 21 U. S. C. 341.

§ 20.1 *Ice cream; identity; label statement of optional ingredients.*

(a) Ice cream is the food prepared by freezing, while stirring, a pasteurized mix composed of one or more of the optional dairy ingredients specified in paragraph (c) of this section, sweetened with one or more of the optional sweetening ingredients specified in paragraph (d) of this section. One or more of the optional characterizing ingredients specified in paragraph (b) of this section and

one or more of the optional ingredients specified in paragraphs (d) (5) to (10) may be used to characterize the ice cream. One or more of the optional caseinates specified in paragraph (e) and one or more of the optional ingredients specified in paragraph (f) of this section may be used, subject to the conditions hereinafter set forth. Coloring may be added. The mix may be seasoned with salt, and may be homogenized. The kind and quantity of optional dairy ingredients used, as specified in paragraph (e) of this section, *and the content of milk fat and nonfat milk solids therein, are such that the weights of milk fat and total milk solids are not less than 10 percent and 20 percent, respectively, of the weight of the finished ice cream;* but in no case shall the content of milk solids not fat be less than 6 percent, except that when one or more of the bulky optional ingredients as specified in paragraph (b) (3) to (8), inclusive, of this section, are used, the weights of milk fat and total milk solids (exclusive of such fat and solids in any malted milk used) are not less than 10 percent and 20 percent, respectively, of the remainder obtained by subtracting the weight of such optional ingredients, modified as prescribed below, from the weight of the finished ice cream; but in no case is the weight of milk fat or total milk solids less than 8 percent and 16 percent, respectively, of the weight of the finished ice cream. The optional caseinates specified in paragraph (e) of this section are not deemed to be milk solids. In calculating the reduction of milk fat and total milk solids from the use of bulky optional ingredients, chocolate and cocoa solids used shall be considered the bulky ingredients of paragraph (b) (3) of this section. In order to make allowance for additional sweetening ingredients needed when bulky ingredients are used, the weight of chocolate or cocoa solids may be multiplied by 1.5; the weight of fruit or nuts used may be multiplied by 1.4; and the weight of partially or

wholly dried fruits or fruit juices may be multiplied by appropriate factors to obtain the original weights before drying and this weight multiplied by 1.4. The finished ice cream contains not less than 1.6 pounds of total solids to the gallon and weighs not less than 4.5 pounds to the gallon. Any artificial flavoring in any chocolate, cocoa, confectionery, or other ingredient used is an optional ingredient of the finished ice cream. (Italics supplied.)